

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

RECEIVED

In the Matter of

DOCKET NO. 03-15
ORIGINAL

NOV - 3 2004

Second Periodic Review of the
Commission's Rules and Policies
Affecting the Conversion to Digital
Television

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MB Docket No. 03-15

Federal Communications Commission
Office of Secretary

RM 9832

To: The Commission

PETITION FOR RECONSIDERATION

RAMAR COMMUNICATIONS II, LTD.

Dennis P. Corbett
Katrina C. Gleber

Leventhal Senter & Lerman PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006

November 3, 2004

Its Attorneys

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Ramar Communications II, Ltd. ("Ramar"), licensee of broadcast station KTEL-TV, Channel 25, Carlsbad, New Mexico, by its attorneys and pursuant to Section 405 of the Communications Act, as amended (47 U.S.C. § 405), and Section 1.429 of the Commission's Rules (47 C.F.R. § 1.429), hereby petitions the Commission to reconsider its decision in the Second Periodic Review Order¹ to dismiss all pending petitions for rule making to amend the analog television Table of Allotments that have not yet been made the subject of a Notice of Proposed Rule Making ("NPRM"). More than *one year ago*, Ramar filed its Petition for Rule Making (the "Petition") seeking to amend the analog television Table of Allotments to change the community of license of KTEL-TV from Carlsbad, New Mexico, to Moriarty, New Mexico. With no forewarning, the Second Periodic Review Order simply dismissed the Petition and other pending analog petitions that are not yet the subject of an NPRM on the sole basis that stability

¹ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, MB Docket No. 03-15, FCC 04-192, at ¶ 68 (rel. Sept. 7, 2004) ("Second Periodic Review Order").

in the allotment table would facilitate the transition to digital television. Petitioner herein seeks grant of this Petition, which is properly filed pursuant to 47 U.S.C. § 405.²

I. Background

On September 15, 1997, the Commission granted Ramar the original construction permit for KTEL-TV to operate on analog Channel 25 at Carlsbad.³ As a new permittee, Ramar was not eligible for a second or “paired” digital channel because its construction permit was granted after April 3, 1997.⁴ As a “singleton” licensee, Ramar chose to build out an analog station with plans to convert to digital on its single operating channel in the future. Ramar’s license to cover was granted on April 5, 2001.⁵

On August 18, 2003, Ramar filed its Petition, seeking to change the community of license for KTEL-TV from Carlsbad, New Mexico, to Moriarty, New Mexico. In the Spring of 2004, Media Bureau Staff orally informed Ramar’s undersigned counsel that the Petition had cleared the Bureau’s internal technical review process. Having been informally advised that the Petition would not be processed, but with no reason given and with nearly ten months elapsed from the Petition’s filing, undersigned counsel sent a letter to Clay Pendarvis of the Media Bureau on June 3, 2004, requesting expeditious processing and grant of the Petition. See Exhibit A hereto, Letter from Dennis P. Corbett to Clay Pendarvis, dated June 3, 2004.

Ramar’s Petition was still pending two months later when the Commission adopted the Second Periodic Review Order on August 4, 2004. Prior to its August 4, 2004 decision, the

² This Petition is timely filed. It has been submitted within 30 days of the publication of the Second Periodic Review Order in the Federal Register. 69 FR 59500 (Oct. 4, 2004); 47 C.F.R. § 1.429. Ramar is an interested party in this proceeding for purposes of Section 1.429(a), as it is aggrieved by the Commission’s action dismissing its pending Petition for Rule Making in the Second Periodic Review Order.

³ See Permit No. BPCT-19960920YU.

⁴ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 13 FCC Rcd 6860, 6865 (1998).

⁵ See License No. BLCT-20000710AAZ.

Commission failed to take action on Ramar's Petition or to otherwise respond to Ramar's counsel's June 3, 2004 letter request. The Commission did not issue a Notice of Proposed Rule Making to amend the Television Table of Allotments for KTEL-TV. The Commission did, however, initiate other rule making proceedings during this time period.⁶

Simultaneously with the adoption of the Second Periodic Review Order on August 4, 2004, the Commission issued a Public Notice suspending the acceptance of new petitions to amend the allotment table to alter DTV and analog TV service areas and channels. The announced purpose of this freeze was the facilitation of the DTV channel election process.⁷ The August 2004 Filing Freeze PN did not say that the Commission would freeze the processing of, or dismiss, petitions *already on file* with the Bureau, such as the Ramar Petition. However, the Second Periodic Review Order released September 7, 2004, included a "death knell" provision whereby the Commission abruptly dismissed all pending petitions to change the NTSC TV Table of Allotments for which a Notice of Proposed Rule Making had not been adopted prior to August 4, 2004. The Commission's only rationale for this drastic action was to make the channel election process and the creation of a DTV allotment table "as manageable as possible."⁸ The Commission's dismissal decision necessitates this Petition for Reconsideration.

II. Discussion

Section 405 of the Communications Act provides "persons aggrieved or whose interests

⁶ See, e.g., *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations, and Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Columbia and Edenton, North Carolina)*, DA 04-2396, (August 6, 2004) ("*Columbia/Edenton*"); *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel 39, 620-626 MHz, Phoenix, Arizona and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, DA 04-2483, (August 6, 2004) ("*Holbrook*"); *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations*, 19 FCC Rcd 2597 (Feb. 12, 2004); *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Asage Beach, Missouri)*, 18 FCC Rcd 19208 (Sep. 24, 2003).

⁷ See DA 04-2446 (rel. Aug. 4, 2004) ("*August 2004 Filing Freeze PN*").

⁸ See Second Periodic Review Order at ¶ 68.

are adversely affected” with a statutory right to petition the Commission for reconsideration of “an order, decision, report, or action that has been made or taken in any proceeding by the Commission.”⁹ As noted above, Ramar’s Petition has been languishing at the Bureau for over a year and Ramar received no prior notice that its Petition was subject to dismissal as a result of the DTV transition or that the Petition’s fate depended on such an arbitrary fact as whether an NPRM had been adopted or not. Furthermore, as a “singleton” licensee, Ramar deserves special consideration by the Commission. All of these facts mandate reinstatement of the Petition and consideration of Ramar’s Petition on the merits.

A. The Commission Provided No Public Notice Advising Ramar and Other Similarly Situated Parties of the Possible Dismissal of Pending Petitions for Rule Making to Amend the NTSC Table of Allotments.

The Commission’s decision to dismiss all pending analog Petitions for Rulemaking that were not the subject of an NPRM by August 3, 2004, without any public notice to the petitioners that such a draconian action was even a possibility, contravenes precedent and fundamental principles of equity. In analogous proceedings where filing or processing freezes have been imposed, the Commission has given fair warning of its intention to make major changes with far reaching effects. Typically, the Commission publishes a deadline by which parties affected by a proposed change in course may file or amend an application or rule making petition. As the Commission stated in the *Sixth Further Notice of Proposed Rule Making*: “We will not accept additional applications for new NTSC stations that are filed after 30 days from the publication of this Further Notice in the Federal Register. This will provide time for filing of any applications that are currently under preparation.”¹⁰ Further, the Commission explained that although it would not continue accepting petitions for rulemaking to add new NTSC allotments, it would continue to accept and process petitions to amend the TV Table of Allotments to change

⁹ 47 U.S.C. § 405(a).

¹⁰ 11 FCC Rcd 10968, 10992 (1996).

channels or communities of license.¹¹ Furthermore, unlike its stance in the Second Periodic Review Order, the Commission explicitly stated that “[a]ny petitions [to add a new allotment] that are currently on file and any rule making proceedings that are currently open will be addressed on a case-by-case basis.” In other words, the Commission did not dismiss these pending petitions, but explained that they would be considered. *See also* AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze, *Public Notice*, DA 03-3532 (rel. Nov. 6, 2003) (“MB will institute a temporary freeze on the acceptance of AM minor change applications at 12:01 a.m. Eastern Time (“ET”), January 12, 2004.”) 18 FCC Rcd 23016 (2003).

These prior freeze notices did not dismiss pending filings. To the contrary, the Commission provided prior notice that the Commission would be suspending or terminating the acceptance of certain applications or petitions, which in turn provided parties with a clearly defined opportunity to file by a date certain to preserve their rights. Ramar, in stark contrast, had absolutely no notice of the impending death knell that would sound for its Petition — even though the Commission had nearly a full year to process that Petition and address its merits. Nor did the Commission even acknowledge that it was changing course from its historical practice in these types of situations. Such notice is required under prevailing precedent. *Greater Boston Television v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”)

Furthermore, in the Notice of Proposed Rule Making which led to the adoption of the Second Periodic Review Order, the Commission never indicated that dismissal of pending

¹¹ *See Sixth Further Notice of Proposed Rule Making*, at 10992-93.

petitions was even a remote possibility. Such notice would have at least given Ramar an opportunity to file comments in this proceeding to urge the Commission not to take such severe action as outright dismissal of Ramar's Petition, with no consideration of its merits. *See Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) ("[T]he notice requirement of the APA [5 U.S.C. § 553(b)] does not simply erect arbitrary hoops through which federal agencies must jump without reason. Rather, the notice requirement improves the quality of agency rule making by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review." (citations omitted)); *see also National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986) ("[U]nfairness results unless persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake. In cases where an administrative agency has failed to give the public advance notice of the scope of its proceeding, courts have invalidated the decisions made." (internal quotations and citations omitted)).

B. The Commission Fails to Provide an Adequate Justification for the Dismissal of All Pending Petitions for Rule Making to Change the Analog TV Table of Allotments Where No NPRM Has Been Issued.

The Commission failed to conduct the full and reasoned public interest analysis essential to its dismissal decision. The Commission merely claimed that such dismissal would facilitate creation of a "stable database." Significantly, the Commission did not provide any information on the number of parties affected by its action (e.g., the number of analog rule making petitions subject to dismissal). In addition, the Commission made no attempt to explain why the Commission could not expeditiously process all pending petitions rather than take the draconian step of outright dismissal with respect to some of them.

Furthermore, if "database stability" is the claimed goal, the Commission failed to address why it was exempting television modification applications (FCC Form 301) from the harsh treatment afforded a limited class of rule making petitioners. Indeed, the Commission did not

dismiss a single pending modification application. Rather, the Order specifically provided that the Media Bureau “will continue to process applications on file as of the date this Order is adopted.”¹² The Commission also elected to continue to process petitions for community of license changes where an NPRM has been issued, despite the fact that issuance of the NPRM was totally in the Commission’s control, regardless of a petitioner’s diligence. As the D.C. Circuit has stated in *Melody Music*, the Commission must “do more than enumerate factual differences, if any, between [similarly situated parties]; it must explain the relevance of those differences to the purposes of the Federal Communications Act.” The Commission has done no such thing here. Instead, the agency has simply thrown out certain rule making petitions without any review of their merits, effectively sweeping away those petitioners’ procedural rights, contravening the Commission’s own historical practice, and ignoring tangible service improvements which would result from full and fair consideration of the merits of the dismissed petitions. Relevant case law demands more. See *Trinity Broadcasting v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (“whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.” (internal citations omitted)).

The inequities are greatly compounded here by the fact that the FCC arbitrarily adopted several NPRMs right before its surprise September 2004 death knell announcement. The Commission was, in other words, continuing to process some “favored” petitions right up until the August 3, 2004 cutoff, which had not been publicly announced beforehand. For example, in *Columbia/Edenton, supra*, the FCC released an NPRM on August 6, 2004 seeking comment on the proposed change in community of license for WUND-TV from Columbia to Edenton, North

¹² Second Periodic Review Order at para. 68.

Carolina, despite the fact that the proposed change had been expressly *opposed* by a local licensee. The proposed community of license change in *Columbia/Edenton* would deprive Columbia, North Carolina of its sole local transmission service. Such removal of a sole service is strictly contrary to well established Commission policy. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990). Despite this obvious facial deficiency, the FCC released the NPRM before the death knell sounded.

Likewise, in *Holbrook*, the FCC released an NPRM in a situation even more complex. Two stations – one commercial, the other noncommercial – proposed a channel swap and a change in community of license even though the Commission acknowledged that the two stations do not “serve substantially the same markets” with communities of license 228 miles apart. The public interest justifications for adopting NPRMs in these cases prior to August 4, 2004 were not simple and clear cut. There can be no rational explanation for treating them differently than Ramar’s Petition.

The FCC is not free to arbitrarily decide on the basis of *unpublished* criteria which Petitions shall live and which shall die. Rather, the Commission is required to treat similarly situated parties in a similar manner, without acting arbitrarily or capriciously in processing similar requests for Commission action.¹³ As the D.C. Circuit observed in *Salzer v. FCC*,¹⁴ “when the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.”¹⁵ In this case, the Commission took the draconian step of outright dismissal of

¹³ *See Communications and Control v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) (finding that dismissal of an application without providing the applicant an opportunity to correct an error was a departure from regular Commission practice and rendered the agency’s rationale arbitrary and capricious). *See Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

¹⁴ 778 F.2d 869 (D.C. Cir. 1985).

¹⁵ *Id.* at 871-72.

an unknown number of petitions for rule making, including Ramar's, without notice and without a full and reasoned explanation for the apparent disparate treatment of parties with similar requests for Commission action.

C. As a "singleton" in the DTV transition, equitable principles mandate expedited consideration of Ramar's Petition on the merits.

As a new licensee, Ramar was not provided with a digital pair and as a "singleton" Ramar does not have the same opportunities to participate in the channel election process as those licensees with a digital pair. Ramar does not have a digital facility to modify at this point in time. Nor does Ramar have any way to know whether any other "singletons" have been stung with this abrupt action. By not providing any information as to the number of parties affected by the decision to dismiss pending petitions, the Commission's Order obviously did not reveal the size of the subset of these petitioners that are "singleton" licensees like Ramar.¹⁶

Elsewhere, the Commission's Order appropriately recognized that "singletons" are in a special situation and should be afforded a heightened level of consideration of their interests in the DTV channel election process.¹⁷ The abrupt dismissal of Ramar's pending Petition, however, evidences no such "high priority" consideration. The Commission has precluded a review of the Petition on the merits to determine whether grant would cause any actual instability to the database, and whether any such impact could possibly outweigh the benefits of Ramar's proposal. To provide only one example of a lost benefit, as the Petition stated, KTEL-TV's change in community of license from Carlsbad, New Mexico, to Moriarty, New Mexico, would

¹⁶ Given the relatively small number of singleton stations nationwide, it is logical to assume that there are only a very few "singleton" licensees like Ramar affected by the Commission's drastic dismissal decision in its Second Periodic Review Order.

¹⁷ See Second Periodic Review Order at ¶ 50 ("[I]n light of [a single-channel licensee's] status, in-core NTSC channels of one in-core licensees will be afforded a high priority in permitting their conversion to a DTV channel.")

provide additional service to a total of 190,468 new persons, without depriving Carlsbad of its only local transmission service.

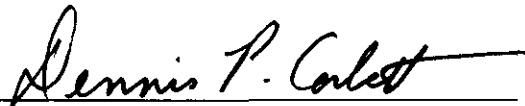
With Ramar at such an obvious disadvantage as a "singleton" in the DTV election process, the Commission should recognize that simple fairness mandates full consideration of the Petition.

III. Conclusion

For all the reasons set forth above, Ramar respectfully requests reinstatement of its Petition, expedited consideration on the merits and prompt issuance of a Notice of Proposed Rulemaking to facilitate its proposed change in the NTSC TV Table of Allotments.

Respectfully submitted,

RAMAR COMMUNICATIONS II, LTD.

By: 

Dennis P. Corbett
Katrina C. Gleber

Leventhal Senter & Lerman PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006

November 3, 2004

Its Attorneys

EXHIBIT A



LEVENTHAL SENTER & LERMAN PLLC

June 3, 2004

DENNIS P. CORBETT
(202) 416-6780

E-MAIL
DCORBETT@LSL-LAW.COM

Clay Pendarvis, Esq.
Media Bureau
Federal Communications Commission
445 Twelfth Street, SW – Room 2-A662
Washington, DC 20554

Re: Petition for Rulemaking (MB 03-262)
Ramar Communications II, Ltd.
KTEL-TV, Carlsbad/Moriarty, New Mexico

Dear Mr. Pendarvis:

By means of the above-referenced Petition for Rulemaking ("Petition"), Ramar Communications II, Ltd. seeks to change the community of license of its existing analog television broadcast station KTEL-TV, from Carlsbad, New Mexico to Moriarty, New Mexico. The Petition has been on file with the Commission since August 18, 2003. Ramar has recently been informally advised by the Commission's Staff that the Commission will not be accepting the Petition for filing and further processing. Ramar, by its attorneys, hereby requests expedited processing and grant of the Petition.

Ramar is unaware of any existing rule, regulation, or policy, published or informal, which would preclude the Commission's acceptance and processing of the Petition. Insofar as Ramar is aware, the Petition satisfies the Commission's technical rules for petitions of this kind, and it is Ramar's understanding that the Petition has already cleared a technical review by FCC Staff. Ramar is left to speculate that the Staff's informal decision not to further process the Petition at this time relates to the Commission's ongoing efforts to facilitate the analog-to-digital conversion of all broadcast television stations in the United States, and a corresponding belief on the part of FCC Staff that it is necessary to freeze and preclude further changes in the analog TV Table of Allotments. While Ramar does not believe a generalized analog freeze would serve the public interest, there are multiple reasons why that approach would be unwise and entirely inequitable in this instance.

First, KTEL-TV is an analog-only station. It has no digital channel pair. For that reason, precluding KTEL-TV from making this change in its analog facilities amounts to an absolute prohibition. KTEL-TV does not have the option, available to a sizable majority of analog television stations, to effectuate a change in digital facilities. In other words, application of a



Clay Pendarvis, Esq.
June 3, 2004
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freeze to the Petition would have a disproportionate, and entirely inequitable impact on KTEL-TV as an analog-only station.

Second, KTEL-TV's move to Moriarty promises substantial public interest benefits. Carlsbad currently has two television stations allotted to it; Moriarty has none. In addition, the change will allow KTEL-TV to reach a much larger audience and cover an expanded area, a well-recognized benefit under well-established Commission precedent. *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4876 n.8 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). *See also Asheville, North Carolina and Greenville, South Carolina*, DA 03-2479 (rel. Aug. 1, 2003); *Greenup, Kentucky and Athens, Ohio*, 68 R.R.2d 1437, 1441-42 (1991). Furthermore, KTEL-TV has carried Spanish-language programming since its inception in 1997, a particularly important benefit given the fact that the Albuquerque DMA is the nation's 11th-ranked market in number of Hispanic TV households. This move promises to bring free over-the-air Telemundo network service to a wider audience in New Mexico.

Finally, Ramar filed its Petition in good faith, more than nine months ago, with every expectation that it would be processed in the normal course. The FCC, even today, has given no written public notice that it will not process petitions of this type. To the contrary, the Commission has routinely processed similar community of license change petitions filed by other parties reasonably contemporaneously with the Petition. Indeed, in *Asheville, North Carolina and Greenville, South Carolina*, *supra*, the Media Bureau reallocated paired analog/digital channels 21/57 to a new community on August 1, 2003, *only 17 days before Ramar filed its Petition*. Decisions like this one gave Ramar every reason to believe its rulemaking request would be processed in the ordinary course. *See also International Falls and Chisholm, Minnesota*, 16 FCC Rcd 17864 (Allocations Br. 2001) (reallotting Channel 11 from International Falls to Chisholm, well after the digital conversion process was underway, on the basis of a Petition for Rulemaking filed one year earlier).

In the past, the Commission has given the industry fair warning when it has planned to make major changes with far reaching effects, typically providing a deadline by which affected applications may be filed. *See Sixth Further Notice of Proposed Rule Making*, FCC 96-317 at para. 60 (rel. Aug. 14, 1996) ("we will not accept additional applications for new NTSC stations that are filed after 30 days from the publication of this Further Notice in the Federal Register. This will provide time for filing of any applications that are currently under preparation.") *See also* AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze, *Public Notice*, DA 03-3532 (rel. Nov. 6, 2003) ("MB will institute a temporary freeze on the acceptance of AM minor change applications at 12:01 a.m. Eastern Time ("ET"), January 12, 2004.") Here, there is every equitable reason to follow a similar course. But even if no advance notice of a freeze is to be given by the Commission, it would be entirely inequitable to freeze processing of this Petition, which was filed so long ago in good faith with absolutely no notice, even informal, that it would not be processed in the ordinary course.



Clay Pendarvis, Esq.
June 3, 2004
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For the reasons set forth above, Ramar respectfully requests that the Commission take whatever steps are necessary to expeditiously process and grant the Petition.

Sincerely,

A handwritten signature in black ink that reads "Dennis P. Corbett". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dennis P. Corbett

cc: U.S. Congressman Randy Neugebauer